

1 have to be party to it or whether we can simply have a
2 production from what they receive, we could subpoena that.
3 We can have a subpoena that says, "Give us whatever you
4 get." And that's appropriate under the rules.

5 MS. POLIVY: Your Honor, I'm sorry.

6 You're saying you could -- is he saying he could
7 subpoena us to tell us to give them whatever we get under
8 FOIA?

9 MR. BLOCK: That's a common discovery request.

10 JUDGE CHACKIN: He could ask you for relevant
11 documents that are in your possession.

12 MR. BLOCK: In your possession, custody or
13 control.

14 In any event, I'd like to reflect on that a little
15 further but the general -- but Your Honor has already
16 decided that FOIA is going to apply, and we support that
17 conclusion.

18 JUDGE CHACKIN: All right. Mr. Cole, do you want
19 to participate in a joint -- with Ms. Polivy, or are you
20 going to file a separate request? Or maybe you're not going
21 to file any request.

22 MR. COLE: Your Honor, I'd like to reflect on that
23 myself as well, but I would like at least some clarification
24 that if we don't file a joint one, that the parties would
25 serve each other with copies of their requests so that we

1 would all know what has been sought.

2 JUDGE CHACHKIN: Does anyone have any objection to
3 that procedure?

4 MS. POLIVY: Yes, Your Honor, I do. I mean this
5 has become clear that what this is all about is who can ship
6 the cost on to whom? I pay for the FOIA documents, and then
7 everybody else comes and says -- and you give me an order to
8 say that I have to get what they get.

9 JUDGE CHACHKIN: Well, let me make it clear --

10 MS. POLIVY: If we have to pay for something, then
11 they have to share.

12 JUDGE CHACHKIN: All right. Let me make it clear
13 that they would have to produce the documents at their own
14 cost. You would advise them that the documents -- that you
15 received documents, and then if they wanted the documents,
16 they would reproduce it and they would pay for the
17 reproduction.

18 MS. POLIVY: Your Honor, we're not talking about
19 the reproduction. If we are charged under FOIA, we're
20 charged for the research time. And it seems to me if we're
21 going to be used in that way, then the parties asking for
22 that have to share the cost that we have been charged.

23 Now, if we're not charged, then there is no
24 problem. But if we're being asked to pay for the
25 Commission's research and then the Commission comes to us

1 and subpoenas us and says, "Now give us these documents," or
2 Mr. Cole does the same, that's a scam.

3 JUDGE CHACHKIN: Well, under the discovery rules,
4 they have a right to ask you to produce any relevant
5 documents in your possession.

6 MS. POLIVY: And this is precisely the reason that
7 I was pointing out what you're doing to us here is you're
8 giving us the worst of all possible worlds.

9 JUDGE CHACHKIN: I'm not giving you anything.
10 They're the rules --

11 MS. POLIVY: You're saying you have to proceed
12 under FOIA. No, the rules -- the rules don't say that you
13 can't go to the Commission and ask the Commission to waive
14 in this case or the Commission can't waive. You are saying,
15 "You're required to get the documents under FOIA but you are
16 required to behave under the discovery rules."

17 JUDGE CHACHKIN: What would happen in any other
18 case if it didn't involve the Commission? If you went out
19 and hired an investigator and got all kinds of documents and
20 the party asked for them, which would cost a lot more than
21 under FOIA. And a party has to turn over all relevant
22 documents.

23 MS. POLIVY: That's true.

24 JUDGE CHACHKIN: You still have to turn over all
25 relevant documents.

1 MS. POLIVY: That's true, Your Honor. But in
2 another case, I wouldn't be asked to go and in effect do
3 that for the party that was standing in the stead of the
4 Commission. This is quite different. Because I am not
5 simply paying to discover what documents I have or
6 developing. I am asked to go and pay for what's in the
7 Commission's files. While the Commission can then turn
8 around, because the Commission staff has created some kind
9 of a fiction that they're separated, which there is no
10 evidence that they are, and say, "Now, you give us what we
11 gave -- what our other hand gave you and you paid for."

12 Your Honor, that's --

13 JUDGE CHACHKIN: Well, Mr. Silberman has
14 indicated --

15 MS. POLIVY: That's not normal and it's not fair.

16 JUDGE CHACHKIN: Mr. Silberman has indicated that
17 as far as he's concerned, he's going to maintain this
18 separateness with the rest of the Commission and therefore
19 he's not going to obtain documents which you couldn't
20 obtain. That's the position he's going to take.

21 MR. BLOCK: Your Honor.

22 JUDGE CHACHKIN: Mr. Block, yes.

23 MR. BLOCK: Just one further point to respond to
24 Rainbow's counsel.

25 If this was a case in which Press was fighting

1 with Rainbow, and we were not at issue here, but Commission
2 documents were otherwise sought by Rainbow, the procedure
3 would be exactly the same. Rainbow would make a request
4 under FOIA, would get the documents, and then under a
5 subpoena from Press, would have to turn those documents over
6 for inspection and copying. And as you said, the inspection
7 and copying costs would be borne by Press, but whatever
8 costs it took for Rainbow to pick those documents up from
9 the Commission would have been borne by Rainbow. And that's
10 just the way the rules are.

11 MS. POLIVY: But that is not the case here, Your
12 Honor.

13 JUDGE CHACHKIN: Why isn't it the case here?

14 MS. POLIVY: The case is that the Commission is a
15 party.

16 JUDGE CHACHKIN: The Commission is not a party.

17 MS. POLIVY: The case is that what is in issue is
18 what happened at the Commission and what is in the
19 Commission's files.

20 And Mr. Block --

21 JUDGE CHACHKIN: Well, Ms. Polivy, I'm not going
22 to --

23 MS. POLIVY: You know, I'm not going to pursue it
24 because you've made your ruling. But the fact of the matter
25 is that Mr. Block keeps trying to posit a situation that

1 doesn't exist.

2 And, you know, I am simply not going to sit here
3 and say, "Oh, yeah, that would be so." It would not be so.

4 JUDGE CHACHKIN: All right. Ms. Polivy, if you
5 wish to obtain these documents, you're going to have to
6 proceed by the Freedom of Information.

7 And the same with Mr. Cole. If he wishes any
8 documents from the Commission staff, he's going to have to
9 proceed by Freedom of Information.

10 And if the parties or any of the parties can get
11 together and file a joint Freedom of Information Act
12 request, that's fine. If not, we'll proceed by ordinary
13 discovery insofar as obtaining any documents that one party
14 receives from whatever source.

15 I think it might be useful at this time, since
16 we've been discussing Issue 1, to deal with the scope of the
17 issue as the parties see it.

18 The issue -- if you read the issue, the issue
19 deals with Rainbow's actions, not the Commission's actions
20 or the staff's actions. And I've heard a lot of discussion
21 here about notes and papers of the staff but I still don't
22 know what that has to do with the issue.

23 As I understand, the issue deals with what Rainbow
24 and any of its agents did. It doesn't deal with any
25 actions, whether wrongdoing or whatever, on the part of the

1 staff.

2 But, Ms. Polivy, apparently hearing you, you
3 somehow feel that somehow the Commission is on trial here
4 under this issue, but I don't read this issue as --

5 MS. POLIVY: Your Honor, I don't --

6 JUDGE CHACHKIN: -- putting the Commission or
7 staff on trial.

8 MS. POLIVY: I'm not putting anyone on trial, Your
9 Honor.

10 JUDGE CHACHKIN: Well, then what do we need --

11 MS. POLIVY: The Commission staff has information
12 because they were involved in the activities.

13 JUDGE CHACHKIN: The information that we're
14 talking about then is information dealing with what you or
15 agents or Ms. Cook, whoever it was, said at these meetings?

16 MS. POLIVY: I think what the question is what
17 took place at the meetings, whether or not there was a
18 violation in rules, and whether it was intentional.

19 JUDGE CHACHKIN: Didn't the Commission make a
20 determination that there is a violation of the rule. The
21 question is whether it was intentional is the only thing
22 that remains to be decided.

23 MS. POLIVY: Your Honor --

24 JUDGE CHACHKIN: Isn't that what the Designation
25 Order says? That the Commission recognizes --

1 MS. POLIVY: No. I mean it's to determine whether
2 we intentionally violated --

3 JUDGE CHACHKIN: I'm not saying. I'm saying but
4 as far as the violation of the rules is concerned, didn't
5 the Commission in their order which was appealed to the
6 Court of Appeals recognize that there was a violation of the
7 ex parte rules.

8 MS. POLIVY: The Commission said --

9 JUDGE CHACHKIN: The only question is that --

10 MS. POLIVY: -- that there was a restricted
11 proceeding and they have never addressed the argument that
12 Rainbow has made from the beginning, that the note 1.1204(a)
13 makes it clear that we were permitted to do what we did.
14 That was never addressed by the Commission. It was never
15 addressed by the Court of Appeals. And when it became clear
16 to the Court of Appeals, we have argued that throughout
17 Rainbow was not injured, therefore was not able to appeal
18 the Commission's rule.

19 We have never waived our position. And it's a
20 legal position and it's not something that evidence is taken
21 on. The question of intention deals with the facts and
22 circumstances surrounding what occurred. That includes
23 Commission staff.

24 There is no question that they have information to
25 shed on what occurred surrounding the discussions and

1 meetings that took place.

2 We are not trying to put the Commission on trial.

3 We have never sought to put the Commission on trial, because
4 frankly we don't think there was any violation.

5 JUDGE CHACHKIN: Mr. Silberman.

6 MR. SILBERMAN: I'll let Mr. Block make the
7 decision.

8 JUDGE CHACHKIN: Mr. Block.

9 MR. BLOCK: We'll refer to paragraph 22 of the
10 Commission's order, and I quote --

11 JUDGE CHACHKIN: You're referring to the
12 Commission's order that was appealed by Rainbow.

13 MR. BLOCK: Yes, yes. Paragraph 22.

14 MS. POLIVY: We did not appeal --

15 MR. BLOCK: By Press, I'm sorry. By Press.

16 JUDGE CHACHKIN: By Press.

17 MR. BLOCK: On review. Paragraph 22.

18 JUDGE CHACHKIN: Yes.

19 MR. BLOCK: First sentence. "We conclude that
20 Rainbow violated the Commission's ex parte rules. We
21 believe that that issue has been concluded. That there was
22 a violation."

23 The issue was very clear as stated by the
24 Commission in its Designation Order that the issue is
25 simply, one, to determine whether Rainbow intentionally

1 violated the Commission's ex parte rules.

2 So the question of Rainbow's intent, knowledge and
3 actions are at issue, not the ultimate question as to
4 whether or not there was a violation under our
5 interpretation of the Commission's decision and the
6 Designation Order.

7 We agree that that question does involve
8 information which may be in the possession of some
9 Commission employees. One could postulate, without ever
10 saying this is what happened, one could postulate that Ms.
11 Polivy was misled by the Commission employees as to what
12 they believe the rules were. That would not be -- in that
13 circumstances, perhaps arguably not an intentional
14 violation.

15 That's just an example of why there may be some
16 reason why the Commission, while not being on trial, might
17 be in fact possessing relevant evidence of what happened at
18 these meetings.

19 But we disagree with Ms. Polivy that Rainbow is
20 still open to the attack on whether or not there was a
21 violation or not. That issue we believe has been concluded.

22 JUDGE CHACKIN: Ms. Polivy, isn't that the case?

23 MS. POLIVY: No, Your Honor. I don't believe it
24 is. And I don't know that it is necessarily something we
25 have to pursue at great length here because the question is

1 a legal one. But when the Commission's order was released,
2 Rainbow was not permitted to appeal that order because it
3 suffered no injury, it had no standing to appeal.

4 Rainbow has never been able to appeal that
5 question, perhaps now it will be able to, but it certainly
6 has never waived its right to do so.

7 So to say the question has been adjudicated
8 without us ever having an opportunity to challenge it is, I
9 believe, contrary to fundamental fairness.

10 We were in an intervenor in the Court of Appeals.
11 We made the same argument. The Court did not address the
12 argument that we made. Since we suffered no injury, we
13 could not appeal the Commission's order, as I'm sure the
14 Commission's special trial staff who is versed in these
15 matters will agree. We did not have standing in the Court
16 of Appeals to argue that.

17 MR. COLE: Your Honor, if I might --

18 JUDGE CHACHKIN: Yes, Mr. Cole.

19 MR. COLE: -- object at this point.

20 Ms. Polivy is correct that the point she is
21 arguing now with respect to whether or not there was a
22 violation was argued at length by Rainbow throughout the
23 FCC's processes, and the memorandum of opinion order, which
24 Mr. Block has referred to, is the agency's culmination of
25 the final disposition of all those proceedings. So the

1 point has certainly been raised through the agency.

2 Now, as to whether or not Ms. Polivy and Rainbow
3 had standing to challenge that I cannot sit here and tell
4 you that she is correct on that because I suspect, and I
5 have not researched this point, I strongly suspect that
6 given the nature of the finding or conclusion of a violation
7 by the agency, and the black mark arguably within Rainbow's
8 record which that would entail, I suspect that that would
9 have constituted adequate injury in fact to justify an
10 appeal on that point.

11 We don't know because Rainbow didn't try. It
12 would be a different story entirely if Rainbow had filed an
13 appeal on that point, and the FCC or Press had moved to
14 dismiss for lack of standing and the Court had granted that.
15 That did not happen. Rainbow did not file anything. To the
16 contrary, Rainbow participated as intervenor, and, again, we
17 have the Court's opinion which makes it clear, I believe,
18 that the Court sustained the Commission's -- or affirming
19 the Commission's conclusion that there had been a violation
20 of the ex parte rules.

21 MS. POLIVY: Your Honor, I would differ with Mr.
22 Cole's off-the-cuff idea of what was, but I don't think it's
23 germane to this argument here. The Commission, in its
24 order, never addressed the question of the note to 1204(a).
25 And the fact of the matter is that the question deals with

1 the legal arguments that we are permitted to make. I do not
2 think in fact it deals with the evidence that would be
3 presented before you, so it becomes kind of an argument of
4 theory.

5 JUDGE CHACHKIN: All right. We don't have to
6 concern ourselves with that. Whether you have the right to
7 pursue that argument or not is not before me. And it's
8 something that you could take up with the proper authorities
9 if necessary.

10 All right. But the question is, so you agree that
11 under this issue that the issue deals primarily with the
12 actions of Rainbow and its agents.

13 MS. POLIVY: I don't know that I agree with the
14 characterization. I agree that the issue is directed at
15 Rainbow. What else?

16 JUDGE CHACHKIN: It says, "By soliciting a third
17 party to call the Commission on Rainbow's behalf and by
18 meeting with Commission staff to discuss the merits of
19 Rainbow's application proceedings."

20 MS. POLIVY: Well, I think that all of these
21 things would be before you to make the determination.

22 JUDGE CHACHKIN: But I am trying to understand to
23 what extent the actions of the staff impact on this issue.

24 MS. POLIVY: Well, I think Mr. Block --

25 JUDGE CHACHKIN: Since the issue deals with the --

1 MS. POLIVY: -- has given an example where it
2 could.

3 JUDGE CHACHKIN: But, Rainbow, as I understand it,
4 was the one that initiated the third-party call.

5 MS. POLIVY: Well, for example, Your Honor, I mean
6 the question is whether we intentionally did something. If
7 we didn't believe there was a violation of law, we couldn't
8 have intentionally violated it.

9 JUDGE CHACHKIN: I'm not arguing that. I'm only
10 saying insofar as soliciting a third party to call the
11 Commission, that's some action of Rainbow we're talking
12 about here. Whether or not it was intentional, whether or
13 not you believe that it wasn't a violation, that's beside
14 the point.

15 And also -- and by meeting with Commission staff
16 to discuss the merits.

17 MS. POLIVY: I think that is all part of the
18 point.

19 JUDGE CHACHKIN: Pardon me?

20 MS. POLIVY: I think that is all part of the
21 point.

22 JUDGE CHACHKIN: I understand that, but I'm just
23 trying to understand, as I read these issues, to what extent
24 does this involve Commission employees and what actions the
25 Commission employees took. The issues speak to what actions

1 Rainbow did, with what Rainbow did. It doesn't talk to what
2 the Commission employees may or may not have --

3 MS. POLIVY: Well, I think what occurred is a part
4 of the issue.

5 MR. BLOCK: May I be heard?

6 JUDGE CHACHKIN: Yes, Mr. Block.

7 MR. BLOCK: It's our position that in light of the
8 words used by the Commission, the question being the
9 intentional violation vel non of Rainbow, that the only
10 relevant information that can be obtained from the
11 Commission staff is reflective of Rainbow's sincerity or
12 lack of sincerity, intentional lack of intention. In other
13 words, the Commission staffs are eyewitness to an occurrence
14 that the Commission has found violated rules. And as
15 eyewitnesses, they can reflect on what they know. And they
16 are only allowed to testify, under the Commission rules, as
17 to their personal knowledge. They can't be asked as
18 experts. They can't be asked questions going beyond what
19 they know as factual matters. That's also very specific in
20 1.311.

21 So that questions could be asked of them as
22 essentially participant in a meeting as an eyewitness
23 reflective of the question asked by the Commission here,
24 which is was there an intentional violation or not.

25 That's the only relevant information they have.

1 And that's the only information that we believe would be
2 appropriate.

3 JUDGE CHACHKIN: So when we talk about notes and
4 documents and all the rest, internal actions of the
5 Commission, how does that -- what's the reason that we need
6 all these documents?

7 MR. BLOCK: If they relate to conversations with
8 Rainbow's counsel and therefore contain statements by
9 Rainbow's counsel as to their, Rainbow's, position, that
10 would be indicative as any other evidence, recorded
11 evidence, of what Rainbow's counsel has said. And,
12 therefore, relevant or potentially relevant on the issue of
13 whether or not there was an intentional violation.

14 JUDGE CHACHKIN: I have no problem with that, but
15 I'm afraid, the way I was listening today, what I heard that
16 somehow some of these documents attempting to be secured
17 deal with the Commission's actions or the Commission's views
18 about ex parte which don't deal with Rainbow's actions but
19 deal somehow with the internal actions of the Commission.

20 And I just want to make sure when I said that the
21 Commission is not on trial that we deal with the issue as
22 the Commission designated it and not change it to some other
23 issue which somehow puts the Commission on trial. That's my
24 concern.

25 MR. BLOCK: We agree, Your Honor, and I would

1 anticipate, in light of Rainbow's counsel's analysis of the
2 issue as she has now stated it, that the question of whether
3 or not a particular information is relevant or not might
4 come to you eventually to resolve under the scope of the
5 order.

6 But to make it very clear, I believe that there's
7 indications in the record as it now stands that there were
8 conversations between certain Commission employees and
9 Rainbow's counsel in which, according to the testimony as
10 summarized by the Court of Appeals, that Rainbow's counsel
11 was informed that this was a certain kind of proceeding.

12 If that is credited, then the result of whether or
13 not -- but that has some implications as to whether or not
14 there was an intentional violation or not. I'm not trying
15 to be vague, but I don't want to talk about the specifics at
16 this point.

17 But the point is that therefore somebody would
18 want to talk to that person and understand whether or not
19 the discussion actually occurred, whether it was in jest,
20 whether it was -- how serious it was, the reaction of
21 Rainbow's counsel.

22 So there's a reason to talk to them, but you are
23 absolutely right, Your Honor, the focus is always on what
24 did Rainbow know, when did it know it, and what did it do
25 about it.

1 JUDGE CHACHKIN: And anyone who could provide
2 information as to that would have relevant information.

3 MR. BLOCK: Exactly.

4 JUDGE CHACHKIN: Now, Ms. Polivy, what is your
5 understanding of the scope of the issue? Is it any
6 different?

7 MS. POLIVY: Your Honor, my understanding -- I
8 think I've stated my understanding of the issues.

9 JUDGE CHACHKIN: Well, I haven't heard it.

10 MS. POLIVY: For example, if there was no belief
11 that there was any violation on the part of the Commission
12 staff that met, that would also be germane.

13 JUDGE CHACHKIN: Now, wait a minute, wait a
14 minute. No belief on the Commission staff as to what?

15 MS. POLIVY: In other words, if a meeting took
16 place and if no one at the meeting believed that there was a
17 violation of the ex parte rule, that certainly is relevant.

18 JUDGE CHACHKIN: How would that be relevant to
19 your actions? The subjective view --

20 MS. POLIVY: Now, wait a minute, wait a minute.

21 JUDGE CHACHKIN: How would the subjective view of
22 the staff be relevant --

23 MS. POLIVY: The people who --

24 JUDGE CHACHKIN: -- to your actions?

25 MS. POLIVY: If counsel asked for a meeting and a

1 meeting took place because no one thought there was any
2 violation of the ex parte rules, certainly that would be
3 relevant.

4 JUDGE CHACHKIN: How would the subjective views of
5 the staff as to whether or not there was a violation of the
6 ex parte rules be relevant to the actions of Rainbow as the
7 issue is designated? That's what concerns me because I
8 think there is a difference here as to the scope of the
9 issue.

10 How would that in any way, the fact that the staff
11 was wrong in holding the meeting, how would that have a
12 bearing on the reactions of Rainbow?

13 MS. POLIVY: Perhaps they weren't wrong, Your
14 Honor.

15 JUDGE CHACHKIN: Pardon me?

16 MS. POLIVY: Perhaps they weren't wrong. Perhaps
17 it's relevant if the Commission has documents that say you
18 may or may not meet in this kind of a circumstance. That
19 will be relevant to making a determination.

20 JUDGE CHACHKIN: How would that be relevant?

21 MS. POLIVY: A determination of intention.

22 JUDGE CHACHKIN: How would that be relevant? How
23 would the actions of the staff be relevant to the actions --

24 MS. POLIVY: Facts and circumstances.

25 JUDGE CHACHKIN: How would that be relevant to the

1 actions of Rainbow and its agents? That's what --

2 MS. POLIVY: I think that all the facts and
3 circumstances surrounding the events are relevant to a
4 determination as to whether you can reasonably determine
5 that if there was a violation that it was intentional or not
6 intentional. Otherwise the question of intention takes
7 place in a vacuum. And I think the Commission staff
8 would -- the Commission counsel would agree that the facts
9 and circumstances surrounding the events that are in issue
10 are relevant.

11 JUDGE CHACHKIN: So you are saying, as I
12 understand you, if the staff determined that there wasn't an
13 ex parte -- it was proper to meet with you or your agents
14 and they made an error in doing so, somehow that would be
15 relevant to the determination of the actions of Rainbow?

16 MS. POLIVY: That would be relevant to a
17 determination as to whether there was an intentional
18 violation certainly.

19 JUDGE CHACHKIN: Mr. Block?

20 MR. BLOCK: Your Honor, we agree that it is
21 reflective of Rainbow's state of mind. One could postulate
22 a situation in which everybody is wrong as to the law. And
23 therefore that would be her defense or the defense of
24 Rainbow that everybody was wrong about the law. That would
25 be reflective of the state of mind of Rainbow's counsel and

1 Rainbow.

2 It's a matter of whether or not the focus is on
3 the staff or the focus is on Rainbow and information that
4 might be relevant to that.

5 One could also postulate, however, that the
6 meeting occurred in total ignorance that there was even an
7 issue. In other words, the staff was not properly informed
8 that this was or was not a certain kind of proceeding. And
9 it met not with the knowledge that this proceeding does not
10 reflect a restrictive proceeding, but totally unaware of the
11 facts. That would not be, in our judgment, indicative of
12 the state of mind of Rainbow then.

13 So it does depend on what happened, and we are not
14 opposed to questions regarding what the staff knew about the
15 restrictive proceeding and what they believe that meant.
16 That I think is relevant to the question presented.

17 But just to be sure, the question presented does
18 not ask, Your Honor, to make a finding that there was not a
19 violation in fact. That's been established.

20 JUDGE CHACHKIN: Mr. Cole, do you have any views
21 on this issue?

22 MR. COLE: Yes, Your Honor. Not surprisingly.

23 I agree with Your Honor's thoughts, as I
24 understand them to have been articulated this morning, that
25 the focus is on Rainbow's intent leading up to the meeting

1 itself, the July 1, 1993, meeting. That is, the contacts
2 with the staff through Ms. Cook and otherwise, and then
3 actually convening the meeting or seeking to have the
4 meeting and then participating in the meeting.

5 I agree to some extent with Mr. Block that the
6 views of the staff and the actions of the staff may have
7 some relevance, depending on what developed, what
8 information develops, in the course of discovery.

9 I do want to put in the caveat at this point that
10 I'm not sure how much relevance it will ultimately have
11 because it depends to some degree on the credibility of the
12 staff's position as it comes out the staff, and by the
13 staff, I'm now referring to before primary participants in
14 the matter of the staff flow, and that would be Mr. Stewart
15 and Ms. Kreisman and Mr. Pendarvis and Mr. Gordon, have been
16 interrogated under oath on the record by the Inspector
17 General, and we have copies of those transcripts. And three
18 of those four, that is, Mr. Stewart, Ms. Kreisman and Mr.
19 Pendarvis, have provided written affidavits to the Court of
20 Appeals in the Pressman Davis proceeding in early 1994. And
21 so we have some sense of where they are coming from.

22 My own personal view on reading those is that
23 there are significant discrepancies in the various
24 statements of the staff members which give me question as to
25 whether or not stories may have been changed along the line.

1 Therefore, I question whether or not the staff will
2 ultimately be the source of much valuable information as to
3 Rainbow's state of mind itself.

4 And I say this simply because I understand Your
5 Honor does not want to put the staff on trial. I do not
6 want to put the staff on trial. But to the extent questions
7 along these lines occur in the course of discovery, I would
8 like to pursue them, and I want to be clear that I'm
9 pursuing them not to put the staff on trial but to flesh out
10 information properly under the issue.

11 JUDGE CHACHKIN: All right.

12 Does anyone else have any thoughts on the nature
13 of this issue?

14 MR. DZIEDZIC: Your Honor.

15 JUDGE CHACHKIN: I don't think --

16 MR. DZIEDZIC: My clients --

17 JUDGE CHACHKIN: I don't think it's appropriate,
18 Mr. Dziedzic, for you to discuss it. Obviously at such
19 time --

20 MR. DZIEDZIC: I have some serious concerns, Your
21 Honor, about statements made by Commission counsel on how
22 they're going to proceed in this matter.

23 JUDGE CHACHKIN: Well --

24 MR. DZIEDZIC: If you prefer, my comments can
25 await --

1 JUDGE CHACHKIN: Well, let me --

2 Does anyone have any objection to Mr. Dziedzic
3 stating a viewpoint?

4 MR. COLE: No, sir.

5 JUDGE CHACHKIN: Recognizing that he's not a party
6 to the proceeding?

7 MR. BLOCK: No, Your Honor.

8 JUDGE CHACHKIN: If no one has any objection, go
9 ahead, Mr. Dziedzic.

10 MR. DZIEDZIC: My concern is not with the nature
11 of the scope of the issue. My clients will either be called
12 to testify or they won't. It's in my understanding of how
13 the separated trial staff intends to proceed in the filing -
14 - the submission they will make later this week apparently.

15

16 With all due deference to the separated trial
17 staff, I'm curious as to the extent of the separated trial
18 staff. Is there -- like who do you work for? Is it --

19 I think you want to make that clear.

20 MR. SILBERMAN: No, we represent the Commission.
21 That's clear from the Designation Order. But we were
22 informed that we --

23 MR. DZIEDZIC: You represent the Commission.

24 MR. SILBERMAN: We represent -- that's what the
25 Designation Order says. We are counsel for the Commission.

1 In paragraph 11 it says, "A separate trial staff shall be
2 designated by the Office of General Counsel to represent the
3 Commission in light of the Mass Media Bureau's recusal from
4 this proceeding."

5 So our client is the Commission. However, we were
6 told that we may not speak about the merits of the case.
7 That's why we're separated out. To any other members of the
8 Commission staff.

9 And it is our view in this case of asking for an
10 order of the Commission to authorize Commission personnel to
11 testify at depositions. It doesn't deal with the merits of
12 the proceeding. It's a request to our superior, Mr.
13 Kennard, as General Counsel of the agency, to ask the
14 Commission in an expedited fashion to issue an order
15 authorizing, as contemplated by the rules, Commission
16 personnel who will be named in the request to testify at
17 depositions in this proceeding and to give testify relevant
18 to the issue at hand, which is the ex parte issue.

19 And what we intend to do is supply or communicate
20 in writing with the General Counsel by memorandum, attach a
21 proposed order, and ask that in light of the nature of the
22 proceeding, that action be expedited and that the Commission
23 issue the order.

24 And that is the way we intend to proceed. We feel
25 that that is the best way to proceed and that's the sensible